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No. 07-____

IN THE

Supreme Court of the United States

EDGAR DIAZ AND EMILE FORT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A divided panel of the Ninth Circuit held that investigative reports independently prepared by a local police department qualify for the federal work product discovery exemption created by Federal Rule of Criminal Procedure 16(a)(2) when they are later turned over to a federal prosecutor. Rule 16(a)(2) permits the government to withhold from discovery "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case."

The question presented is:

Whether the Ninth Circuit erred in holding that Rule 16(a)(2)'s work product exemption applies to reports prepared by a local police department without any federal involvement and long before any federal criminal investigation or prosecution on the theory that the local police become "agent[s]" of the federal government when the reports are later turned over to the federal government.

PARTIES TO THE PROCEEDINGS

The parties before the court below were Robert Calloway, Edgar Diaz, Emile Fort, and the United States of America. The parties before this Court are contained in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Edgar Diaz and Emile Fort respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Rule 16 discovery order of the United States District Court for the Northern District of California is available at 2006 WL 1716309 (Pet. App. 82a-85a). The subsequent testimony preclusion sanction order for noncompliance is available at 2006 WL 2038487 (Pet. App. 65a-81a).

The Ninth Circuit's opinion is reported at 472 F.3d 1106 (Pet. App. 19a-64a). The Ninth Circuit's order denying rehearing and rehearing *en banc* and the accompanying dissent of Judge Wardlaw, joined by Judges Pregerson, Reinhardt, W. Fletcher, Fisher, and Paez, are reported at 478 F.3d 1099 (Pet. App. 1a-18a).

JURISDICTION

The Ninth Circuit's opinion was issued on January 8, 2007. Pet. App. 19a. Petitioners' petition for rehearing and rehearing *en banc* was denied on March 8, 2007. Pet. App. 1a. On May 17, 2007, Petitioners timely filed an application to extend the time in which to file a petition for certiorari from June 6, 2007 to July 6, 2007. On May 22, 2007, Justice Kennedy granted the application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The principal statutory provision involved is Federal Rule of Criminal Procedure 16, which is set out in the Appendix to this petition. Pet. App. 86a-91a.

STATEMENT OF THE CASE

Federal Rule of Criminal Procedure 16 addresses pretrial discovery in federal criminal cases, and was adopted "in the view that broad discovery contributes to the fair and efficient administration of criminal justice." FED. R. CRIM. P. 16

advisory committee's note (1974 Amendment). Two subsections of Rule 16—Rules 16(a)(2) and 16(b)(2)—carve out "information not subject to disclosure" by the government and the defendant respectively. In relevant part, Rule 16(a)(2) exempts from discovery "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case."

Until the Ninth Circuit's decision in this case, no federal court of appeals had concluded that a local police department conducting an investigation before any federal involvement acts as the federal government's agent for purposes of Rule 16(a)(2). The Ninth Circuit's decision thus dramatically expands the scope of Rule 16(a)(2)'s work product exemption and correspondingly restricts the material available to defendants. As explained by the dissent of six judges from the denial below of rehearing *en banc*, the Ninth Circuit's erroneous construction of Rule 16(a)(2) is particularly troubling because it (1) "fashions from whole cloth a retroactive theory of agency between local and federal officials," (2) "directly conflicts with Supreme Court precedent [] and the way prosecutors, defenders and district courts apply Rule 16 on a daily basis," (3) "reduce[s] prosecutorial transparency in criminal prosecutions, provides tools for discovery gamesmanship, unwittingly hampers prosecutors by creating traps for reversible *Brady* error, and increases the costs and burdens on criminal defendants," and (4) "has far-reaching effects, touching a vast number of criminal prosecutions." Pet. App. 4a. This Court's intervention is necessary to resolve this important and recurring issue.

A. Statutory Background

Rule 16 has been significantly expanded since the Federal Rules were first adopted, and now imposes discovery obligations on both the government and the defense. *See* FED. R. CRIM. P. 16 (1966 Amendment); *id.* (1974

Amendment); *id.* (1975 Amendment). Unlike civil discovery, the defendant must affirmatively invoke the right to discovery. *Compare* FED. R. CRIM. P. 16(a)(1), *with* FED. R. CIV. P. 26(a). Once Rule 16 is invoked, the government is entitled to seek reciprocal discovery from the defendant. *See* FED. R. CRIM. P. 16(b)(1).

The items subject to discovery under Rule 16(a)(1)(E) are:

> Documents and Objects: Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> (i) the item is material to preparing the defense;
>
> (ii) the government intends to use the item in its case-in-chief at trial; or
>
> (iii) the item was obtained from or belongs to the defendant.

There is no dispute in this case that the local police reports at issue qualify for discovery under Rule 16(a)(1)(E), as they are "documents" within the "possession, custody, or control" of the federal prosecutor and they are "material to preparing the defense." Pet. App. 5a-6a. Thus, the only question before the district court and panel was whether the local police reports were protected work product under Rule 16(a)(2).

B. District Court Proceedings

A grand jury returned an 86-count second superseding indictment charging Edgar Diaz, Emile Fort, and others with racketeering crimes that included predicate acts involving

drugs, firearms, murder, and attempted murder. Pet. App. 21a. The defendants invoked their right to discovery under Rule 16. In response, the government produced certain reports the San Francisco Police Department ("SFPD") had prepared before the initiation of the federal prosecution. *Id.* The government, however, redacted from the reports all witness names, locator information, and other information. These reports were not the result of a federal/state taskforce or joint investigation; they were prepared without any federal involvement or direction and long before any federal prosecution was begun.

The defendants sought an order from the district court compelling production of the withheld information. In an order dated May 18, 2006, the district court held that all investigative reports created by the SFPD that are "in the possession, custody or control" of the United States Attorney's Office are "documents" subject to discovery within the meaning of Federal Rule of Criminal Procedure 16(a)(1)(E). *Id.* at 21a. The court further held that a report is exempt from discovery under Rule 16(a)(2) "only if [the report] was prepared in connection with investigating or prosecuting the subject case by police officers having a relationship to the federal prosecutors substantially equivalent to that of federal investigative agents." *Id.* at 82a. The court invited the government to demonstrate that the reports were so prepared by filing declarations and other materials. The government, however, took the position that it was not required to make any such showing and refused to submit such proof.

Faced with the government's position, the district court ruled in a June 16 order that "all of the local police reports related to this case in the possession of the United States Attorney's Office are producible under Rule 16 and are not within the work-product exemption to Rule 16(a)(2)." *Id.* at 83a. The court directed the government to allow defendants access to the information redacted from the police reports. The disclosure, however, was subject to a "very strong,

muscular" protective order that, to address any witness safety concerns, severely restricted access and the use defense counsel could make of the information. *Id.* at 48a; *see also* FED. R. CRIM. P. 16(d)(1) ("At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief."). Again, the government refused to cooperate in the drafting of the protective order, taking the position that no protective order could ever be adequate. Pet. App. 48a.

The government promptly notified the district court that it would not comply wit its order. The district court accordingly issued a sanction order on July 20, 2006, which precluded the government from using against defendants the testimony of any inculpatory civilian witness whose name was redacted from the discoverable materials, unless the government demonstrated that the refusal to allow access was substantially harmless. *Id.* at 65a.

The government appealed both the Rule 16 ruling and the July 20, 2006 sanction order.

C. The Panel Decision Below

A divided Ninth Circuit panel held that the police reports at issue were entitled to the work product protection of Rule 16(a)(2). Pet. App. 20a. The court acknowledged that "[i]t is undisputed that the written police reports at issue here are 'documents' within the 'possession, custody, or control' of the federal prosecutor and that they are 'material to preparing the defense.'" *Id.* at 26a. As such, "the reports are discoverable under Rule 16(a)(1)(E) unless exempted by Rule 16(a)(2)." *Id.*

Turning to Rule 16(a)(2), the court first recognized that the word "government" refers to the federal government because it is used as shorthand for "federal government" throughout the Rules. *Id.* at 26a-27a. The court concluded, however, that the SFPD reports fall within the federal work product exemption because the term "'government agent'

includes non-federal personnel whose work contributes to a federal criminal 'case.'" *Id.* at 31a.

In reaching this conclusion, the panel majority neither referenced any agency principles nor made any attempt to explain how the local police had acted as agents of the federal government within any accepted understanding of agency. The panel majority made no finding that the SFPD had acted under the control of or coordinated with federal authorities at the time the local police reports were made. Instead, the panel held that it was sufficient that the local police had conducted an independent investigation into the crimes at issue and subsequently turned reports documenting that information over to a federal prosecutor.

The court relied in large part for this ruling on its belief that Rule 16(a)(2)'s term "government agent" should be given the same meaning as Rule 6(e)(3)'s term "government personnel." Pet. App. 26a-27a, 29a-30a. Rule 6(e)(3) permits disclosure of grand jury material to "any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing the attorney's duty to enforce criminal law," FED. R. CRIM. P. 6(e)(3)(A)(ii). Although Rule 16(a)(2) is limited to government "agents" and includes no such explicit reference to state government employees or agents, the Ninth Circuit found that Rule 16's term "government agent" should sweep just as broadly as the more expansive language of Rule 6(e)(3). *Id.* at 30a-31a.

After broadly construing the term "government agent," the court held that the phrase "in connection with investigating and prosecuting the case," is likewise broad enough to include any such work by any "government agent," at any time, even before there is a federal case. *Id.* at 31a-33a. The majority thus concluded that the district court erred in finding that the work product exemption of Rule 16(a)(2) did not apply to the local police reports at issue. *Id.* at 43a.

Judge William Fletcher dissented. In his view, "[t]he meaning of Rule 16(a)(2) is so plain that it should be unnecessary to do anything more than simply read the text in order to conclude that it does not protect documents prepared by the San Francisco Police Department without any involvement by the federal government." *Id.* at 51a. Parsing the language of the rule, Judge Fletcher noted that, to qualify for Rule 16(a)(2) protection, "internal government documents must be made by 'an attorney for the government or other government agent.'" *Id.* at 53a.

Judge Fletcher concluded the majority had misinterpreted this requirement by not conducting any inquiry into whether the SFPD had acted as the federal government's agent within the meaning of settled common law agency principles, including the requirement that the asserted agent have acted with "prior or contemporaneous authorization . . . by the federal government." *Id.* at 54a. In addition, Judge Fletcher observed that "[r]eading the term 'agent' to require prior or contemporaneous authorization is consistent with other uses of that term in Rule 16," such as Rule 16(a)(1)(C), which mirrors the ordinary definition of "agent" when it speaks of persons who are "legally able to bind the defendant regarding the subject of [a] statement . . . [o]r conduct because of that person's position as the defendant's director, officer, employee, or *agent*." *Id.* (internal quotation marks omitted; alterations and emphasis in original).

Judge Fletcher also noted that the majority did not consider the effect of its ruling on the defense's work product exception under Rule 16(b)(2). *Id.* "[I]f making and later giving a document to the federal government can make a person a 'government agent' within the meaning of Rule 16(a)(2)," then likewise giving a document to defense counsel in the same way can make a person an "agent" of the defense and exempt more defense documents from discovery as well. *Id.* at 54a-55a.

D. The Ninth Circuit's Denial Of Panel Rehearing And Rehearing *En Banc*

On March 8, 2007, the Ninth Circuit denied rehearing and rehearing *en banc*. Judge Wardlaw, joined by Judges Pregerson, Reinhardt, W. Fletcher, Fisher, and Paez, dissented. The dissent emphasized that the panel's decision "ignores the plain meaning of the Federal Rules of Criminal Procedure" and "significantly alters the landscape of criminal discovery." Pet. App. 4a. Observing that "[t]he issue is one of exceptional importance to the administration of justice in criminal proceedings," the dissent explained that the panel majority's construction of Rule 16(a)(2) is particularly troubling because it (1) "fashions from whole cloth a retroactive theory of agency between local and federal officials," (2) "directly conflicts with Supreme Court precedent, circuit precedent, and the way prosecutors, defenders and district courts apply Rule 16 on a daily basis," (3) "reduce[s] prosecutorial transparency in criminal prosecutions, provides tools for discovery gamesmanship, unwittingly hampers prosecutors by creating traps for reversible *Brady* error, and increases the costs and burdens on criminal defendants," and (4) "has far-reaching effects, touching a vast number of criminal prosecutions." *Id.*

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for two reasons:

First, the decision below ignores the plain text of Rule 16 and is contrary to congressional intent. It is likewise irreconcilable with this Court's precedent regarding the construction of Rule 16(a)(2) as a work product exception to discovery as well as this Court's precedent on agency relationships.

Second, this case raises an important and recurring issue regarding the interpretation of the Federal Rules of Criminal Procedure, an area of law that this Court has identified as in particular need of national uniformity. Absent correction by this Court, the Federal Rules will be interpreted in such a

way as to disadvantage defendants and create general confusion in the law governing the scope of discovery in criminal cases. This case is, moreover, an ideal vehicle for resolving the issue. The factual circumstances here of a local police investigation occurring before a subsequent federal prosecution is a commonly recurring one. The proper interpretation of Rule 16(a)(2)—and in particular whether it requires that the local entity have been acting as an agent under settled principles of agency law—is squarely presented. The issues have been illuminated by detailed and divergent opinions in the district court and the court of appeals. Further, although the issue is a recurring one with which the district courts have frequently grappled, discovery issues of this type do not typically result in appealable orders and thus are not commonly the subject of detailed appellate decisions of the kind presented here. This case thus presents an important opportunity for this Court to resolve the issue presented for the benefit of the lower courts and litigants alike.

I. THE NINTH CIRCUIT'S DECISION IS PLAINLY WRONG BECAUSE IT CONFLICTS WITH THE RULE'S LANGUAGE AND WITH CONGRESSIONAL INTENT

A. The Decision Below Ignores The Plain Language Of Rule 16(a)(2)

The decision below ignores the governing statutory language. "The starting point for [the] interpretation of a statute [or rule] is always its language." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *see also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993) (interpreting rules as "any statute"); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) ("Because the Federal Rules of Evidence are a legislative enactment, the Court turns to the traditional tools of statutory construction, in order to construe their provisions. [The Court] begin[s]

with the language of the Rule itself.") (internal citation and quotation marks omitted).

Rule 16(a)(2) provides that "this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." The only interpretation of Rule 16(a)(2) that is supported by its plain language is one which limits its application to work product produced by an *agent* of the *federal* government working on a *federal* case.[1]

As the Ninth Circuit itself acknowledged, the Rule is clear that "attorney for the government or other government agent" refers only to attorneys or agents of the federal government. Pet. App. 26a-27a. Although the term "government" is not itself defined in the Rules, it is used as shorthand throughout the Rules for "federal government."[2]

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[1] In *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004), the district court addressed whether Rule 16(a)(2) provides an exception to the discovery requirements of Rule 16(a)(1)(E). Because Rule 16(a)(2) begins with the general statement, "Except as Rule 16(a)(1) provides otherwise," the court wrote that a plain reading of the text would lead to the conclusion that all materials meeting the parameters of Rule 16(a)(1)(E) must be produced. 224 F.R.D. at 505 (emphasis omitted). A survey of the Rule's history, purpose, and structural amendments led the court to conclude that this conflict resulted from a "scrivener's error" and was not intended by the Advisory Committee or by Congress. *Id.* at 507. Though neither party raised this issue below, the Ninth Circuit adopted for purposes of its decision the *Rudolph* court's analysis. Pet. App. 25a n.2.

[2] *See, e.g.*, Rule 7(f) ("The court may direct the government to file a bill of particulars."); Rule 9(a) ("The court must issue a warrant—or at the government's request, a summons—for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause . . . ."); Rule 11(a)(2) ("With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere . . . ."); Rule

When the drafters of the Rules wished to expand the scope of the term, they did so explicitly, as in Rule 6(e)(3)(A)(ii), which allows the disclosure of a grand jury matter to "any government personnel—*including those of a state, state subdivision, Indian tribe, or foreign government.*" FED. R. CRIM. P. 6(e)(3)(A)(ii) (emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (internal quotation marks omitted). Therefore, "government agent" in Rule 16(a)(2) means an agent of the federal government.

Similarly, although the term "agent" is not defined by the Rules, a federal government agent must be an individual or organization who has manifested consent to act for the federal government and is under the right of control of the federal government. This is so because the term "agent" carries a common law meaning, and "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (citation omitted).

12(b)(4) (entitled "Notice of the Government's Intent to Use Evidence"); Rule 12(h) ("At a suppression hearing, a law enforcement officer is considered a government witness."); Rule 12.1(b) (requiring attorney for the government to disclose information for "each witness the government intends to rely on to establish the defendant's presence at the scene" and "each government rebuttal witness to the defendant's alibi defense"); Rule 12.2(c)(3) (referring to the "government's examination" of the defendant's mental competency in context of insanity defense); *see also* Rules 5(c)(3)(D)(I), 5.1(a)(3) & (4), 5.1(f), 12.3(a)(4), 12.4(a)(2), 14(a), 14(b), 15(d), 17(b), 18, 23(a)(2), 24(b)(1) & (2), 26.3, 28, 29(a), 29.1, 31(b)(3), 32.1(a)(5)(B)(I), 32.2(a), 32.2(b)(1) & (4), 32.2(e)(1) & (2), 35(b), 41(a)(2)(C), 42(a)(2), 46(f)(3)(A) & (C), 48(a).

At common law, an "agent" is one who acts in an agency relationship, which is "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958). "At the core of agency is a fiduciary relation arising from the consent by one person to another that the other shall act on his behalf and subject to his control." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 393 (1982) (internal quotation omitted); *see also Meyer v. Holley*, 537 U.S. 280, 286 (2003) ("[T]he relevant principal/agency relationship demands not only control (or the right to direct or control) but also 'the manifestation of consent by one person to another that the other shall act on his behalf . . ., and consent by the other so to act.'") (quoting RESTATEMENT (SECOND) OF AGENCY § 1(1)). Therefore, an agent of the federal government is a person or entity acting at the behest of the federal government or under the control of the federal government, with consent of the federal government so to act.

The Ninth Circuit's holding ignores this well-established definition of agency and thereby effectively reads the word "agent" out of Rule 16(a)(2). The only requirement under the Ninth Circuit's approach is that an investigation have been conducted by some government, at any time even well before federal involvement, and that the results of that investigation have been provided to a federal prosecutor for use in prosecuting a case. The panel majority thus reads Rule 16(a)(2) as though it exempts from discovery any document made "in connection with investigating or prosecuting [a] case," leaving out entirely the additional requirement that the documents have been made by a federal "government agent." By rendering the word "agent" superfluous, the Ninth Circuit's ruling violates the settled principle that a court is to "'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533

U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

To the extent that the majority has given any meaning to the term "agent," it has construed the term to mean anyone who simply contributes to the federal case. No accepted definition of the word "agent" reaches so broadly.

The panel majority's extra-textual justifications for departing from Rule 16(a)(2)'s plain meaning are also unpersuasive. No doubt recognizing that its broad construction of "agent" exempts from discovery materials that cannot legitimately be viewed as attorney work product, the Ninth Circuit found that Rule 16(a)(2) is not coextensive with the work product privilege. Pet. App. 36a. This Court, however, has treated Rule 16(a)(2) as a work product rule. In *United States v. Armstrong*, 517 U.S. 456, 463 (1996), this Court explained that, under Rule 16(a)(2), a defendant "may not examine Government *work product* in connection with his case." *Id.* (emphasis added). Similarly, *United States v. Nobles*, 422 U.S. 225 (1975), affirmed the applicability of work product doctrine in criminal cases. *See id.* at 238 ("[The] role [of the work product doctrine] in assuring the proper functioning of the criminal justice system is even more vital."). Multiple courts of appeals have followed this Court's guidance and characterized Rule 16 as providing a work product exception. *See, e.g.*, *Virgin Islands v. Fahie*, 419 F.3d 249, 257 (3d Cir. 2005) ("The exception in Rule 16(a)(2) applies to work product."); *In re Grand Jury Subpoenas*, 318 F.3d 379, 383-85 (2d Cir. 2003) (explaining Rule 16(b)(2) codifies a work product exception); *In re Grand Jury Subpoenas*, 959 F.2d 1158, 1166-67 (2d Cir. 1992) (same). *But see United States v. Mann*, 61 F.3d 326, 331 (5th Cir. 1995) (noting that Rule 16(a)(2) was not coextensive with civil work product exemptions).

The Advisory Committee Notes similarly make clear that Rule 16 was meant to be a work product exception. *See, e.g.*, FED. R. CRIM. P. 16 advisory committee notes (1974

Amendment) ("Subdivision (a)(2) is substantially unchanged. . . . The only proposed change is that the 'reports, memoranda, or other internal government documents made by the attorney for the government are included to make clear that the *work product* of the government attorney is protected.") (emphasis added).

Accordingly, Rule 16(a)(2) should be interpreted consistent with the limits of the work product exception and its purpose: sheltering the mental processes of the attorney and protecting material prepared by the attorney or his agents in connection with litigation. *See Nobles*, 422 U.S. at 238-39. Within this framework, the circumstances of the creation of a document or report are what is relevant in determining whether it falls within a work product exception. *See Fisher v. United States*, 425 U.S. 391, 403-04 (1976) ("This Court [has] uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice.").

In contrast, the Ninth Circuit extends Rule 16(a)(2) to reports prepared by local police officers in the course of police work unrelated to a federal investigation or case and disconnects Rule 16(a)(2) from its purpose of protecting the work product of federal attorneys and federal agents. Furthermore, the privileged status of a document under the Rule no longer depends on the document's creation but instead on who possesses it. Local police reports that, when created, are not privileged under the Rule may later become privileged if they happen to come into the hands of federal prosecutors or investigators.

By decoupling Rule 16(a)(2) from its work product foundations, the Ninth Circuit's holding allows discovery exemptions that have nothing to do with the underlying rationale of the work product protection. For example, investigative reports created by local police in a state fraud

prosecution unrelated to any federal investigation and having no relation to federal law enforcement might be used and exempted from discovery in a later federal RICO investigation years later. These reports would be exempted even though they have nothing to do with shielding the mental process of the federal attorney or his agents in preparing for trial or protecting the work of the attorney or his agents. Under this erroneous reading, "the work-product rule protects virtually all documents now in the possession of the government, whether or not those documents were made by agents of the federal government." Pet. App. 64a (Fletcher, J., dissenting).

Similarly erroneous was the Ninth Circuit's assertion that, because "physical possession" is dispositive in determining the discoverability of material under the Jencks Act, symmetry requires that the same test be applied to determine the applicability of the work product exception to documents under Rule 16(a)(2). Pet. App. 37a-39a. The Jencks Act requires the government to disclose to criminal defendants any statement made by a government witness that is "in the possession of the United States" once such witness has testified. 18 U.S.C. § 3500(a) & (b). This possession-based analysis is not relevant in the Rule 16(a)(2) context. First, the plain language of the statutes is different—Rule 16(a)(2)'s "internal documents . . . made by" the federal government is not synonymous with the Jencks Act's "possession." Second, the Ninth Circuit's reading renders the exception to have the same scope as the rule that it modifies, thereby fundamentally changing discovery under the Federal Rules. Under the Ninth Circuit's reading, whether a document is in the "possession" of the federal government becomes the key to determining whether a document is exempted from the general production requirement of "documents . . . within the government's possession, custody, or control." FED. R. CRIM. P. 16(a)(1)(E); *see also United States v. Gatto*, 763 F.2d 1040 (9th Cir. 1985) (holding that evidence becomes discoverable

under Rule 16(a)(1)(E) when state authorities place it in the possession of the federal government). This odd result contradicts this Court's guidance that exceptions should not be read as symmetrical to rules that they modify but instead should be read narrowly. *See Comm'r v. Clark*, 489 U.S. 726, 739 (1989).

B. The Decision Below Creates Consequences Inconsistent With Congressional Intent

The Ninth Circuit's expansion of the prosecution's work product exception drastically expands the scope of the defense work product exception. In relevant part, the defense work product exception found in Rule 16(b)(2)(A) reads that "reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense" are excepted from discovery. The panel majority's sweeping construction of the term "agent" affects this subsection as well. "Symmetry demands that if the government is allowed, under Rule 16(a)(2), to refuse to disclose any document that comes into its possession, custody, or control, regardless whether it was 'made by' a federal 'agent,' defendants should be afforded comparable protection from disclosure by Rule 16(b)(2)." Pet. App. 63a (Fletcher, J., dissenting). Therefore, a defendant can now invoke retroactive agency and withhold almost any reports or memoranda that relate to his defense, so long as they are in the defendant's possession.

The Ninth Circuit's ruling also hampers the government's ability to fulfill discovery requirements under *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Thus, *Brady* places on prosecutors an affirmative duty to disclose evidence favorable to a defendant. *See Kyles v. Whitley*, 514 U.S. 419, 432 (1995).

The prosecutor's *Brady* obligations to disclose information extends beyond information that is personally held by him to include information possessed by the prosecutor's agents. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). Consequently, the Ninth Circuit's sweeping definition of agency in the Rule 16 context would also affect agency within the *Brady* context, with the result that *Brady* disclosure requirements, and thus the possibility of *Brady* error, reach as broadly as the Ninth Circuit's sweeping construction of agency. The Ninth Circuit's definition of agency extends the federal government's *Brady* duties to include the disclosure of information in control of local agencies that participated in the "case" even before there was any federal involvement, control, or traditional agency relationship. Federal prosecutors will then face the task of attempting to discover any possible *Brady* material from state and local agencies that provided any investigative material to the federal government. With this expanded duty also comes an equally large increase in the possibility of *Brady* error. Indeed, "[t]he panel majority's opinion expands the government's *Brady* obligations into a space where even the best-intentioned prosecutor will never be able to comply." Pet. App. 14a (Wardlaw, J., dissenting from denial of rehearing en banc).

The panel majority's decision also frustrates the "broad discovery" envisioned by the Rules and the contribution such discovery makes to the "fair and efficient administration of criminal justice." FED. R. CRIM. P. 16 advisory committee note (1974 amendment). Because of the sweeping work product exception the Ninth Circuit's decision creates, the defense is less likely to ask for discovery. In turn, the prosecution's right to discovery will be triggered less often. Pet. App. 16a (Wardlaw, J., dissenting from denial of rehearing en banc). Further, even if discovery is invoked, under the majority's reading of Rule 16(a)(2), the government may now aggressively claim privilege on a wide range of documents, resulting in little material of use being

turned over to the defense. *Id.* In turn, the defense may aggressively claim privilege on documents by claiming that the document's producer was an agent of the defense, whether or not an agency relationship existed at the time. More court involvement and frequent *in camera* reviews will be required to complete the discovery process.

The panel majority's interpretation likewise frustrates the scheme the Rule creates for addressing any witness safety or other legitimate concerns that might arise from disclosure. Pet. App. 17a (Wardlaw, J., dissenting from denial of rehearing en banc). Rule 16(d)(1) gives district courts the power to "for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." Rather than granting the government a blanket right to withhold documents, the Rule thus envisions that the district court will evaluate the degree to which disclosure will actually impair the government's valid interests. The result of the panel's ruling, however, is to take the district court out of that process. Instead, as happened in this case, prosecutors will make the unilateral decision that information should not be produced due to witness concerns, without any opportunity for the neutral oversight of the district court judge, contrary to Rule 16(d)(1).

II. THE QUESTION PRESENTED IS OF GREAT NATIONAL IMPORTANCE, AFFECTING THE UNIFORM ADMINISTRATION OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND AFFECTING A SUBSTANTIAL NUMBER OF CRIMINAL CASES

The question presented involves an issue of great national importance and affects a substantial number of criminal cases. By vastly expanding the work product exception codified in Rule 16(a)(2), the Ninth Circuit has upset the delicate balance between discovery and privilege in a significant number of criminal cases. In *Nobles*, this Court explicitly recognized the vital importance of establishing the

proper contours of the work product doctrine in criminal cases, and the need for clarity in this area is strong. 422 U.S. at 238. The Ninth Circuit's decision creates both tension with precedent and ambiguity in the application of Rule 16(a)(2), and this Court's intervention is necessary to ensure uniformity in criminal discovery, including discovery in death penalty cases such as the present case.

A. A Substantial Portion Of Criminal Cases Are Impacted By The Ninth Circuit Panel's Reconstruction Of Rule 16

The Ninth Circuit panel's holding allows prosecutors to withhold production of local police reports created before any involvement of the federal government in a case and in doing so restricts discovery production to criminal defendants in a substantial number of criminal cases. In the Ninth Circuit, the Federal Public Defenders report that 30% to 60% of criminal prosecutions assigned to their offices "originated with or involve local law enforcement." Pet. App. 17a-18a (Wardlaw, J., dissenting from denial of rehearing en banc). These cases in the Ninth Circuit alone account for a significant portion of federal criminal prosecutions in the United States as a whole. Statistics from the Administrative Office of the United States Courts show that approximately 21.9% of federal criminal prosecutions commenced during the five-year period ending March 31, 2006 were filed in district courts in the Ninth Circuit.[3] But

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[3] There were a total of 75,263 prosecutions commenced in the Ninth Circuit from 2001 to 2006, representing 21.9% of the 343,648 prosecutions commenced nationally during the same period. *See U.S. District Courts – Criminal Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2005 and 2006, available at* http://www.uscourts.gov/caseload2006/tables/D00CMar06.pdf; *U.S. District Courts – Criminal Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2003 and 2004, available at* http://www.uscourts.gov/caseload2004/tables/D00CMar04.pdf; *U.S. District Courts – Criminal Cases Commenced,*

the true percentage of affected criminal cases is much higher, as it is likely that a similar percentage of cases in the federal courts around the country also involve documents produced by state or local law enforcement agencies.

In this large portion of cases, "federal prosecutors can now assert a work product privilege over any and all investigatory materials acquired from local authorities and refuse to turn them over to the defense." Pet. App. 18a (Wardlaw, J., dissenting from denial of rehearing en banc). This reconstruction of Rule 16 beyond work product will force defense counsel to dedicate more resources to tracking down information through other means. *Id.* In turn, the cost of criminal defense, much of which is borne by the public under the Criminal Justice Act, will rise. *Id.* Due to the exemption of more information from discovery, defense counsel will have to turn to other, more costly and duplicative measures to obtain the information necessary for effective defense since there is no exception under Rule 16(a)(2), even for substantial need. *Cf.* FED. R. CIV. P. 26(b)(3) (providing for disclosure of work product with "substantial need" and "undue hardship"). The fact remains that even with increased cost and investigation, some information now exempted from discovery by the Ninth Circuit's ruling, yet still necessary for a defense, will never be uncovered, and the effectiveness of counsel will be reduced in these cases.

The number of affected cases, although currently high, will continue to rise due to increased state and local involvement in the war on terror. In these cases, a sweeping construction of Rule 16(a)(2) provides an absolute bar on the discovery of exempted documents. Therefore, the need for

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Terminated, and Pending During the 12-Month Periods Ending March 31, 2001 and 2002, available at http://www.uscourts.gov/caseload2002/tables/d00cmar02.pdf.

clarity in this area of the law is strong. A clear rule is needed not simply for the uniform administration of the criminal work product exception but also for guidance on how the administration of Rule 16(a)(2) impacts defense discovery, and a prosecutor's *Brady* obligations.

B. The Court Should Resolve This Issue Now

The petition should be granted even though there is not currently a developed circuit split. Although, as explained above, the Ninth Circuit's holding is clearly erroneous and impacts a substantial number of federal district court cases, it is not an issue likely to produce frequent appeals to the circuit courts. This fact is confirmed by the district court cases—themselves split—addressing this very issue. *See United States v. Cherry*, 876 F. Supp. 547 (S.D.N.Y. 1995) (no appeal taken given that defendant pled guilty); *United States v. Duncan*, 586 F. Supp. 1305 (W.D. Mich. 1984), *aff'd*, 763 F.2d 220 (6th Cir. 1985) (appeal not taken on discovery issue after defendant pled guilty); *United States v. DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980) (holding that the government must produce local police reports, and no appeal taken); *United States v. Green*, 144 F.R.D. 631, 641 (W.D.N.Y. 1992) (same, defendant convicted at jury trial and did not appeal discovery ruling). This lack of appeals is not surprising given that discovery orders are generally not appealable. *See, e.g.*, *Church of Scientology v. United States*, 506 U.S. 9, 17 n.11 (1992) ("As a general rule, a district court's order enforcing a discovery request is not a 'final order' subject to appellate review."). This case came to the Ninth Circuit only because the government took the extraordinary step of refusing to comply with the district court's order, and accordingly, the district court sanctioned the government, leading to this appeal. Waiting for additional circuit case law on this issue requires either the potentially unfair conviction of a defendant who was denied discovery to be appealed, or for the government to take the costly step of requesting an extraordinary writ or interlocutory appeal.

Although this Court takes into account the existence of a circuit split when considering whether to grant certiorari, *see* SUP. CT. R. 10(a), it is also clear that this Court will grant certiorari when an important and reoccurring issue of federal law is raised even without a circuit split, *see* SUP. CT. R. 10(c). This case concerns the construction of the Federal Rules of Criminal Procedure, and this Court has granted certiorari on the sole basis that a case concerns the construction of a major federal statute. *See, e.g.*, *United States v. Donovan*, 429 U.S. 413, 422 (1977) (granting certiorari to resolve issues "concern[ing] the construction of a major federal statute"); *United States v. Robinson*, 361 U.S. 220, 222 (1960) ("Because of the importance of the question to the proper and uniform administration of the Federal Rules of Criminal Procedure, we granted certiorari."). For this reason alone, certiorari is warranted in this case.

This case presents the Court with a rare vehicle to resolve this vitally important issue on which a paramount need for national uniformity exists. "The Federal Rules of Criminal Procedure were designed to provide a uniform set of procedures to govern criminal cases within the federal courts consistent with the requirements of justice and sound administration." *United States v. Weinstein*, 452 F.2d 704, 715 (2d Cir. 1971). The issue is squarely presented here and has been illuminated in comprehensive majority and dissenting opinions in the court below, including at the *en banc* stage. Absent this Court's review, the Ninth Circuit's erroneous ruling misinterpreting the Federal Rules will lead to further erroneous results contrary to the Rule 16(a)(2)'s plain meaning and intent. Certiorari should be granted to prevent this from occurring.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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